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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal;

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN;

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g, which requires educational institutions to preserve the confidentiality of "education records," which are defined as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution," § 1232g(a)(4)(A), prohibits public school teachers of pre-secondary school students from utilizing their students to grade each other's homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Independent School District No. 11 of Tulsa County, Oklahoma (the "Owasso School District"), Dale Johnson, Superintendent of the Owasso School District, Lynn Johnson, Assistant Superintendent of the Owasso School District, and Rick Thomas, Principal of the Sixth Grade Center at the Owasso School District, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra* A-1) is reported at 229 F.3d 956, and includes the order denying rehearing *en banc* and the dissent of four of the ten active judges of the court of appeals from the order denying rehearing *en banc* (App., *infra* D-1). The opinions of the district court denying Respondent's motion for a temporary restraining order (App., *infra* C-1) and granting summary judgment to Petitioners (App., *infra* B-1) are unreported.

JURISDICTION

The court of appeals issued an opinion in this case on July 31, 2000. Petitioners timely filed a petition for rehearing *en banc*. Although the court of appeals declined to grant rehearing, the court vacated its original opinion

and issued a modified opinion on October 4, 2000 (App., *infra* D-2). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves construction and interpretation of the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"). The full text of FERPA is set forth in the appendix (App., *infra* E-1).

STATEMENT OF THE CASE

A. Factual Background

Some teachers in the Owasso School District utilize students to grade homework papers and weekly tests by having the students exchange papers and score one another's work as the teacher goes over the answers aloud in class. The teachers who utilize this grading practice have found it to be educationally beneficial because it allows them to provide students with immediate feedback. Immediate feedback promotes mastery of the course material by providing prompt reinforcement of the correct answers and immediate correction of mistaken answers.[1]

[1] Neither the court of appeals nor the district court found it necessary to identify what percentage of teachers at the Owasso School District utilize this grading practice or in what academic disciplines it is most prevalent. The evidence in the record establishes that *all* of the reasons advanced in support of this procedure relate to its effectiveness as a pedagogical practice, however.

Under Oklahoma law, a teacher may be responsible for teaching up to 140 students a day.[2] It would be virtually impossible for a teacher to grade 140 homework papers or weekly quizzes overnight and have them ready to be returned the following day, and it would be utterly impossible for a teacher to grade that many papers and return them on the same day they are handed in by the students. The district court found that if teachers are not able to have students grade one another's papers, "students will only receive their results after delay," which "may have a detrimental effect upon both teaching and learning" (App., *infra* C-6).

In addition, this grading practice also allows teachers to cover more material and assign significantly more work than would be possible if the teacher had to grade every individual homework paper. The district court found that, without the ability to have students grade each other's papers, "teachers will begin assigning less homework and quizzes," which may also "have a detrimental effect" upon education (App., *infra* C-6).

[2] OKLA. STAT. tit. 70, § 18-113.3 (2000 Supp.) provides in part:

> C. Beginning with the 1996-97 school year and each school year thereafter, no teacher who is counted in class size count for grades seven through twelve shall be responsible for the instruction of more than one hundred forty (140) students on any given six-hour school day.

Teachers prefer not to allow students to grade their own papers because of the temptation this creates for a student to cheat (App., *infra* C-2).

The district court noted that the grading practice at issue in this case is not unique to the Owasso School District and has been employed in schools across the United States for decades (App., *infra* C-6).

Once the correct and incorrect answers on the homework papers have been marked, the papers are returned to their owners. Students may then announce their own scores aloud from their seats or, if they wish to report their scores in private, take their papers to their teacher and disclose their scores in confidence. The graded results from the homework papers and weekly tests may be but are not necessarily recorded in the teachers' grade books for use in calculating the students' final letter grade in the course.

It is undisputed that teachers at the Owasso School District use this grading practice *only* for daily homework assignments and interim tests and do *not* allow students to score each other's nine-weeks tests. It is also undisputed that teachers do *not* disclose the letter grade on a student's report card or the permanent grade placed on the student's transcript to any other students (App., *infra* B-5; C-2).

Respondent Kristja J. Falvo is the mother of three pre-secondary school students who attend schools operated by the Owasso School District. Respondent objected to the teachers in her children's classes allowing students to exchange papers and score each other's work, contending that her children were embarrassed by the practice.

Respondent acknowledged that any student who did not wish to announce aloud the grade marked on his or her paper was permitted the option of taking the paper to the teacher and disclosing his or her grade in confidence. Respondent contended, however, that the practice of exchanging papers for grading purposes was itself humiliating and embarrassing to her children because, even if the grade was not announced aloud, the student who checked her child's paper would nonetheless know the grade on that paper. As the court of appeals noted, Respondent "testified that the calling out of her children's grades did not really matter because the prior act of one student grading another's paper itself constitutes a disclosure" (App., *infra* A-3, n.2).

B. Proceedings Below

Respondent filed suit in the United States District Court for the Northern District of Oklahoma under 42 U.S.C. § 1983 seeking damages, a declaratory judgment, and an injunction prohibiting the Owasso School District from permitting its teachers to allow students to grade each other's papers. Respondent contended that the grading practice at issue violated her children's right of privacy protected by the Fourteenth Amendment to the United States Constitution. Respondent also asserted that the practice violated the Family Education Rights and Privacy Act because, she contended, the graded papers were "education records" that must be kept confidential under FERPA. The statute defines "education records" as "those records, files, documents, and other materials which – (i) contain information directly related to a

student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A).

Shortly after filing her complaint, Respondent sought a temporary restraining order enjoining the Owasso School District from utilizing the grading practice at issue. After an evidentiary hearing, the United States District Court for the Northern District of Oklahoma entered a written order declining to grant injunctive relief and setting forth the findings of fact and conclusions of law on which its decision was based (App., *infra* C-1).

Respondent then filed a motion for declaratory judgment and partial summary judgment. Petitioners filed a cross-motion for summary judgment agreeing that the case presented no dispute as to any material fact but asserting that Petitioners rather than Respondent were entitled to judgment as a matter of law. With regard to Respondent's FERPA claim, Petitioners relied on a letter issued by the Family Policy Compliance Office ("FPCO") of the United States Department of Education, which is the federal agency charged with enforcing FERPA, that addressed the specific issue raised by this action.[3] In that letter the FPCO concluded that using students to grade a test or homework assignment of another student and

[3] Petitioners submitted to the district court the Declaration of Leroy S. Rooker, made under penalty of perjury pursuant to 28 U.S.C. § 1746, in which Mr. Rooker stated that he is the Director of the Family Policy Compliance Office and has served in that position for eleven (11) years. Mr. Rooker further stated that the current position of the FPCO with regard to the issue of students grading other students' papers is set forth in his letter of July 15, 1993 (App., *infra* F-1).

calling out that grade in class is *not a violation* of FERPA. In expressing that opinion, the FPCO noted that FERPA is not "intended to interfere with a school's, or classroom teacher's, ability to carry out what are generally considered to be normal and legitimate educational activities and functions." The FPCO thus concluded that "a thoughtful, common sense, and flexible approach is necessary in judging the impact of some classroom activities on a student's right to privacy and vice versa." The FPCO stated:

> FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

(App., *infra* F-4 through F-5).

The district court denied Respondent's motion for partial summary judgment and granted summary judgment to Petitioners on both of Respondent's claims. The court rejected Respondent's Fourteenth Amendment right of privacy claim, concluding that "the interim tests and homework assignments . . . are not 'highly personal' matters worthy of constitutional protection" (App., *infra* B-5). With regard to Respondent's FERPA claim, the district court deferred to the FPCO's interpretation of the statute, concluding that such interpretation "is reasonable

and does not conflict with the expressed intent of Congress" (App., *infra* B-4).

Respondent appealed to the United States Court of Appeals for the Tenth Circuit. The court of appeals affirmed the district court's grant of summary judgment to Petitioners on Respondent's Fourteenth Amendment right of privacy claim, reasoning that although "the school work and test grades of pre-secondary school students constitute somewhat personal or intimate information," to conclude that such information is so highly personal as to fall within the zone of constitutional protection "would trivialize the Fourteenth Amendment" (App., *infra* A-8).

The court of appeals reversed the grant of summary judgment on Respondent's FERPA claim, however, ruling that the district court erred in giving deference to the FPCO's interpretation of FERPA. The court ruled that "the meaning of the terms 'education records' and 'maintain' are clear from [FERPA] itself," thus deference to the FPCO was inappropriate because "a court can only defer to an agency's interpretation if a statute is deemed ambiguous" (App., *infra* A-18). The Tenth Circuit found no ambiguity in FERPA that would justify deferring to the FPCO's interpretation of the statute.

The court of appeals also determined that the FPCO's interpretation was not "entitled to respect" under this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because a qualifying statement in the FPCO letter suggested that "the FPCO may not have thoroughly

considered the issue . . . " (App., *infra* A-19).[4] The court further found the FPCO opinion "bereft of any reasoning underlying the rather conclusory opinion that grades written down by other students and announced to the teacher are not 'maintained' as required under FERPA" (App., *infra* A-20). Finally, the court found significant the FPCO's use of the language " 'maintained' by an educational agency or institution" rather than the broader language from FERPA that encompasses records "maintained by an educational agency or institution *or by a person acting for such agency or institution*" (App., *infra* A-20; quoting 20 U.S.C. § 1232g(a)(4)(A)(ii) (emphasis added by court)).

The court of appeals concluded that "[b]ased purely on the language of the statute itself, . . . the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under FERPA" (App., *infra* A-20 through A-21). The court found that the grading practice violated FERPA irrespective of whether the students announced their grades aloud in class or reported their grades to the teacher in confidence, noting that "the method of reporting the grades is irrelevant to our analysis, because a

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[4] In its July 15, 1993, letter, the FPCO stated:

> Because you do not fully explain the details surrounding the activities you identify, it would not be appropriate for this Office to comment on whether the District's participation in the activities would violate rights afforded parents by FERPA. However, below is a general discussion of FERPA as it relates to the types of activities you present.

(App., *infra* A-20; F-3 through F-4).

disclosure occurs at the earlier stage when one student grades the work of another" (App., *infra* A-21, n.10).

The court found no significance in the fact that the teachers have discretion to record or not record the grade for use in calculating the student's final grade in the class, reasoning that because "at least some grades which students give one another and report to the teacher are then recorded in the teacher's grade book," those grades are " 'maintained . . . by a person acting for [an educational] agency or institution' and constitute 'education records' " (App., *infra* A-21). The court also noted in a footnote that "[e]ven if the homework or test grade never figures into the student's final grade, the teacher must still receive the grade to use it for some other purpose, perhaps to preserve, in a gradebook or otherwise, a yardstick of each student's performance and progress to better develop effective teaching strategies" (App., *infra* A-24, n.11).

The court of appeals remanded the case to the district court for further proceedings (App., *infra* A-32).

Petitioners timely filed a petition for rehearing *en banc*. On October 4, 2000, the court issued an order denying Petitioners' request (App., *infra* D-1).

Circuit Judge Kelly filed an opinion dissenting from the denial of rehearing *en banc*, which was joined by Circuit Judges Tacha, Baldock, and Brorby. The dissenting judges observed that the court's decision "[d]efining 'education records' to include 'grades which students record on one another's homework and test papers and then report to the teacher' . . . is a vast expansion of the actual words of the statute, and [is] unsupported by the

legislative history" (App., *infra* D-2 through D-3). The dissenting members of the court concluded that "[a] careful reading of FERPA and its legislative history requires a much narrower definition of 'education records.' " The dissent noted that the majority's interpretation of the term "education records" to include the grades placed on daily homework papers and interim tests "necessarily invokes the right to a hearing to challenge the grade" recorded on that homework paper or interim test under 20 U.S.C. § 1232g(a)(2), and obligates educational institutions "to maintain an access record indicating those who have obtained or requested access to" the grade recorded on that homework paper or interim test under 20 U.S.C. § 1232g(b)(4)(A). The dissent observed that "[g]iven the thousands of grades a student might receive over time, this seems impossible, if not implausible" (App., *infra* D-5).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit has decided an important question of federal law that will have a major impact far beyond the geographical boundaries of the Tenth Circuit. The decision of the court of appeals has created confusion and apprehension among public educators throughout the nation regarding the legality of a common and long-standing educational practice. As no other federal court has addressed whether Congress intended the Family Education Rights and Privacy Act to prohibit this grading practice, the Court should grant certiorari to consider this important question of first impression under federal law. *See American*

Federation of Musicians v. Wittstein, 379 U.S. 171, 175 (1964) (certiorari granted to review question of first impression under Labor-Management Reporting and Disclosure Act of 1959).

Moreover, the Court should grant certiorari because the court of appeals rejected the long-standing interpretation of the Family Policy Compliance Office of the Department of Education regarding the scope of the term "education records" under FERPA. School districts, boards of education, and individual teachers, administrators and board members throughout the nation now risk litigation and liability – *including individual liability* – if they continue the practice long authorized by the FPCO of allowing pre-secondary school students to exchange and grade each other's homework papers, quizzes, and tests. Because the court of appeals held that the FPCO's interpretation was not only entitled to no deference but also carried only "minimal persuasive power" (App., *infra* A-19), public educators in every school district in the country must now question whether they may safely rely on the FPCO's well-established interpretation as to the scope of "education records" under FERPA. *See Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974) (certiorari granted because decision of court of appeals was asserted to be inconsistent with the long-established policy of the Secretary of the Interior and the Bureau of Indian Affairs).

Finally, the decision of the Tenth Circuit is erroneous and represents "a vast expansion of the actual words" of FERPA that is plainly inconsistent with the intent of Congress in enacting the statute, as was recognized by the four judges who dissented from the denial of rehearing *en banc* (App., *infra* D-2 through D-3). The question

presented is important to the educators and students of our nation's public schools. For these reasons, the Court should review the decision of the court of appeals.

I. The Court of Appeals Has Decided an Important Question of Federal Law that Will Have a Significant Impact on the Day-to-Day Operations of Our Nation's Public Schools

The preeminence of public education in the hierarchy of our nation's values cannot be disputed. Almost 50 years ago, this Court recognized that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954). Even prior to *Brown*, however, this Court had emphasized that "[t]he American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). In *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972), this Court noted that "education is necessary to prepare citizens to participate effectively and intelligently in our open political system. . . ." And in *Plyler v. Doe*, 457 U.S. 202, 221 (1982), this Court observed, "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society." Because of the importance of education in our society, this Court should be extremely cautious of allowing the decision of a lower federal court that threatens to disrupt the daily operations of our nation's classrooms to go unreviewed.

The decision of the court of appeals will play havoc with even the most routine daily tasks in the education of our nation's children. The court's decision means that teachers may no longer ask one or more students to walk about the classroom returning homework papers, quizzes, or tests that have been corrected and/or graded by the teacher to their classmates, because the student(s) selected to pass out the corrected or graded work would have the opportunity to see the scores or grades thereon. Teachers who choose to allow students to grade their own work in class, but who then take up the papers to make random checks for cheating, will not be able to ask one or more students to collect the scored papers. Nor will teachers be able to collect corrected or graded work by asking students to pass their papers to the front of the class. Likewise, teachers may no longer utilize student aides to assist them in grading papers and recording grades. Under the Tenth Circuit's reasoning, all of these practices violate FERPA because one or more students would be permitted to see the score or grade recorded on another student's paper.[5] As the four dissenting judges noted:

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[5] In response to the petition for rehearing *en banc* filed by Petitioners, the court of appeals modified its opinion to address some of the concerns raised by Petitioners. The court noted that teachers may avoid liability under FERPA by "collecting and passing out papers themselves or placing graded papers in sealed envelopes." The court was untroubled by the practical difficulties its decision imposes on public educators, blithely explaining that

> if a teacher would like one student to collect from the others self-graded papers, the teacher can simply direct the students to turn their papers over so the grade is not revealed. Similarly, if a teacher does not wish to personally hand out graded papers, the teacher may have the students come to retrieve the papers one at a time, so they do not see each others' grades; alternatively, the teacher could fold over the papers to conceal the students' grades but not their names and thus allow a student to hand back the papers.

(App., *infra* A-28 through A-29, n.13). Petitioners respectfully submit that a teacher's choice to allow students to collect or pass out graded papers with no precautions to preserve the confidentiality of the grades recorded on those papers beyond admonishing the students to "turn their papers over" or "fold[ing] over the papers to conceal the students' grades" would likely expose that teacher to personal liability should one of his or her students bring a *Falvo*-type action against the teacher under 42 U.S.C. § 1983.

> Practical difficulties with the court's decision abound because care must be taken to insure that no student learns the grade of another. . . . A routine function – passing out a stack of graded papers alphabetized by name – will now require teacher involvement and the students cannot do it themselves for fear that one student might see another's grade, intentionally or unintentionally. This cannot be what Congress meant when it sought to protect a student's personal information and permanent academic record from unwarranted disclosure. Our teachers are overworked and underpaid now. What will happen to them when they can be sued by every irate parent or student claiming that someone saw a grade or that they were denied a fair hearing to challenge a test grade?

(App., *infra* D-5 through D-6).

The court of appeals suggested that school districts need not forego any of the benefits of having students grade each other's papers because FERPA "does not prohibit students from correcting papers if done anonymously or with the consent of parents" (App., *infra* A-28, n.13). But as educational experts who have analyzed the court's opinion have already noted, the court's proposed solutions are much more problematical than they may at first appear. Writing in the November issue of *Phi Delta Kappan* magazine, Professor Perry A. Zirkel, Iacocca Professor of Education at Lehigh University, observed:

> The court's express exceptions for anonymous, i.e., effectively coded, papers and for parental consent present cumbersome practical challenges. Social security numbers or simple personal ID numbers are not likely to be unidentifiable to other students. Similarly, the cost of obtaining informed consent from parents for students under age 18 may outweigh the benefits of the practice.

Zirkel, *A D-Grading Experience?*, PHI DELTA KAPPAN, November 2000, at 253.

As Professor Zirkel's comment illustrates, teachers who wish to use coded papers will not be able to use the student's social security number or student ID number because of the high probability that some classmates will already be familiar with those numbers. Instead, each teacher will have to come up with his or her own unique "code" and advise each of his or her students – in confidence – of that student's assigned code number. Even

with these precautions, there is no assurance that students will not deliberately or inadvertently reveal their individual code numbers to their classmates.

Nor is parental consent an effective alternative. At the very least, obtaining signed consent forms from every parent will be an additional administrative burden on each teacher who wishes to continue utilizing students to grade papers. Moreover, it is highly unlikely that teachers will obtain signed parental consent forms from every parent. A few parents, like Respondent, will undoubtedly choose not to allow their children to exchange papers with other students. Far more will simply not understand the request or will ignore the consent form. Some consent forms will undoubtedly be lost in the process of being transported from school to home and back. Teachers will thus have to choose between foregoing an effective educational practice if fewer than 100% of that teacher's students return signed consent forms or giving the appearance of allowing "special treatment" to a few students by allowing them to grade their own papers while everyone else in class must exchange papers. Neither scenario is a prescription for an efficient educational atmosphere in the classroom.

Finally, the court's decision implicates educational practices far more significant than the daily collection or passing out of graded papers. Selection of students for academic achievement awards, publication of the names of students earning honor roll recognition, and determination of the eligibility of student-athletes for extracurricular athletics under "no pass, no play" rules will all be

affected by the decision of the court of appeals.[6] The court's decision also calls into question the legality under FERPA of the practice common not only in public schools but also in our nation's institutions of higher learning of basing a portion of a student's grade in a course on the student's participation in class. If a student never participates in in-class discussions, surely his classmates will be aware that such student will receive only minimal credit or no credit at all for that portion of his final grade in the class.

As Professor Zirkel summarized:

> By implication, the 10th Circuit's decision also calls into question various other practices in basic or, in some cases, higher education, such as 1) the enlistment of the proverbial "teacher's pet" to help score, during free periods or after school, other students' papers; 2) the awarding of a group grade and other such practices related to cooperative or small-group learning; 3) in-class announcing of students' grades; 4) displaying student papers that have earned top grades; 5) publishing the names of students on the honor roll; 6) posting lists of students' grades by name or reasonably identifiable code; and even 7) sharing individual athletic results with the media. . . .

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[6] As the four judges who dissented from the order denying rehearing *en banc* pointed out: "A school district should be wary of academic awards based upon grades, for the underlying grades may be revealed. Likewise, a determination that a student athlete is academically ineligible carries the same risk" (App., *infra* D-5 through D-6).

Zirkel, *A D-Grading Experience?*, PHI DELTA KAPPAN, November 2000, at 253.

The opinion of the United States Court of Appeals for the Tenth Circuit in this case is of substantial concern to school districts, school officials, and teachers across America. Therefore, this Court should grant certiorari and review the lower court's decision.

II. The Court of Appeals Expressly Rejected the Long-Standing Interpretation of FERPA Followed by the Family Policy Compliance Office of the Department of Education, Thereby Creating Doubt Among This Nation's Public Educators Regarding Continued Reliance on the FPCO's Analysis

In its opinion, the court of appeals *expressly* rejected the long-standing interpretation of the Family Policy Compliance Office of the United States Department of Education. The court concluded that the FPCO's interpretation was not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because "the meaning of the terms 'education records' and 'maintain' are clear from the statute itself" (App., *infra* A-18). The court further determined that the FPCO's analysis was not "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because it "lack[ed] sufficient reasoning, fail[ed] to account for the breadth of FERPA's language, and indicate[d] . . . [a] somewhat cursory and purely hypothetical consideration of the issue before the court . . . " (App., *infra* A-20).

The court of appeals' assertion that there is no "ambiguity" regarding the meaning of "education records" under FERPA is refuted by the divided opinions of the

active judges of the Tenth Circuit regarding Petitioners' request for rehearing *en banc*. More important, it is refuted by the text of FERPA itself.

In enacting FERPA, Congress not only defined what is included in the term "education records"[7] but also *excluded* from that definition any "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. § 1232g(a)(4)(B)(i). The clear import of this language is to exclude from the *definition* of education records the type of routine grades and scores received by teachers and recorded in their gradebooks. Yet the court of appeals read this portion of the statute as if it provided that granting "substitutes" access to education records was an *exception* under 20 U.S.C. § 1232g(b)(1), which is the portion of the statute that specifies persons who may be allowed access to education records without violating FERPA (App., *infra* E-6).

The lower court's analysis ignores the salient fact that § 1232g(b)(1)(A) *already* provides that it is not a violation of FERPA to allow access to education records by "other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to

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[7] FERPA defines "education records" as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A).

have legitimate educational interests. . . . " Because allowing a substitute teacher access to education records is already permitted by § 1232g(b)(1)(A), the court's construction of the words "and which are not accessible or revealed to any other person except a substitute" as merely permitting a teacher to disclose his or her grade book to a substitute is illogical.[8]

At the very least, § 1232g(a)(4)(B)(i) creates an ambiguity as to whether routine grades recorded in a teacher's gradebook fall under the definition of "education records" or are excluded from that definition.

The court of appeals' reasoning for not giving due respect to the FPCO's interpretation has even more serious flaws. The court criticized the FPCO for reliance on insufficient reasoning, failure to consider the breadth

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[8] In response to the Petitioners' petition for rehearing, the court of appeals amended its opinion to explain further its reasoning on this point (App., *infra* A-23). The court of appeals stressed that its interpretation of § 1232g(a)(4)(B)(i) is "the only reasonable way to construe that provision" because its interpretation allows a teacher to show his or her gradebook to a substitute *"without having to also show it to a parent"* (App., *infra* A-24; emphasis original).

The Petitioners submit that this makes sense *only* if § 1232g(b)(1)(A), which allows the disclosure of education records to "other school officials, including teachers," is somehow construed as *not* allowing "substitute teachers" to have access to education records. Such a reading is plainly unsupportable. The better interpretation of § 1232g(a)(4)(B)(i) is that it does not purport to specify who may or may not have access to a student's "education record," but simply defines the type of document *excluded* from the definition of "education record," *e.g.*, a teacher's gradebook.

of FERPA's language, and a "cursory" and "purely hypothetical" consideration of the question presented (App., *infra* A-20). Yet, as the four dissenting judges noted, the court's analysis of "education records" "necessarily invokes the right to a hearing to challenge the grade" recorded on a homework paper, quiz, or test under 20 U.S.C. § 1232g(a)(2), and obligates educational institutions "to maintain an access record indicating those who have obtained or requested access to" the grade recorded on that homework paper or interim test under 20 U.S.C. § 1232g(b)(4)(A) (App., *infra* D-4 through D-5). As the discussion at pp., *infra* 23-28, establishes, the court of appeals plainly departed from Congress' intent.

Regardless of the merits of the court of appeals' analysis, however, the court's rejection of the FPCO's long-standing interpretation of FERPA creates doubt and uncertainty about the continued viability of the FPCO's analysis. This uncertainty regarding the status of the law – and the propriety of continuing to rely on the FPCO's assurances that FERPA does not prohibit teachers from allowing students to grade each other's papers – will adversely affect the education of our nation's youth. When confronted with the question of whether to continue to follow the position espoused by the FPCO or adopt the view promulgated by the Tenth Circuit, many litigation-averse school districts across the nation will undoubtedly choose to follow the path least likely to embroil them in costly lawsuits. Although school officials can hardly be criticized for electing to protect the public purse, such educators should not be compelled to choose between facing vexatious litigation or foregoing beneficial educational practices. Because the decision of the

court of appeals has engendered nation-wide uncertainty regarding the FPCO's interpretation of FERPA, this Court should grant certiorari and review the decision of the court of appeals.

III. The Decision of the Court of Appeals Is Erroneous and Is Clearly Contrary to the Intent of Congress in Enacting FERPA

In enacting FERPA, Congress provided parents the right to a hearing to challenge the content of a student's "education records." 20 U.S.C. § 1232g(a)(2).[9] The legislative history of this provision makes clear that although Congress did not intend to require an educational agency to hold a hearing to challenge a teacher's assessment of the quality of a student's work, a hearing is required to

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[9] That portion of FERPA provides:

> (2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided *an opportunity for a hearing by such agency or institution,* in accordance with the regulations of the Secretary, *to challenge the content of such student's education records,* in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, *and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.*

20 U.S.C. § 1232g(a)(2) (emphasis added).

allow the parents to seek to correct any *ministerial error* in the student's "education records":

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given in the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of *institutional records* which record the grade which was actually given. Thus, the parents of a student could seek to correct an improperly recorded grade, but could not through the hearing required pursuant to law contest whether the teacher should have assigned a higher grade because the parents or students believe that the student was entitled to the higher grade.

120 CONG. REC. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment) (emphasis added).

The foregoing legislative history leaves no doubt that Congress intended the hearing right granted by § 1232g(a)(2) of FERPA to apply only to allow a parent or student to challenge "the grade given in the student's performance in a course" and maintained in the education agency's "institutional records." Yet according to the court of appeals, the public schools of this country must grant a hearing to every parent seeking to challenge the correctness of any score recorded by his or her child on any specific homework paper, quiz, or test by such child, because the score of each such homework paper, quiz, or test is an "education record" entitled to the full panoply

of protections secured by FERPA. Surely it cannot be suggested that Congress intended that result.[10]

The dissenting judges also referred to 20 U.S.C. § 1232g(b)(4)(A),[11] which requires the "school official and

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[10] In its modified opinion, the court of appeals asserted that "Congress could have sensibly intended to provide parents a means to challenge the accuracy of grades on individual homework and test papers" (App., *infra* A-26). Yet the hypothetical situation constructed by the court to justify this result involved a situation in which the incorrect grading "significantly impact[ed]" the student's permanent grade. Thus, the court refuted its own point. Petitioner agrees that the scenario described by the court, in which a semester-long series of incorrect grades accumulates and negatively impacts the student's final grade, would be subject to a curative hearing under FERPA. Unlike the court of appeals, however, Petitioners would *not* require educational institutions to schedule a hearing to mollify parents who believe their child was erroneously credited with 8 points instead of 9 on a 10 point quiz or homework assignment. It simply cannot be suggested that Congress could have "sensibly intended" to allow parents a hearing to challenge the correctness of the score recorded on each and every test, quiz, and homework assignment completed by their child, regardless of the ultimate impact of that particular score on the student's final grade.

[11] That portion of FERPA provides:

> (4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. *Such record of access shall be available only to parents, to the*

his assistants who are responsible for the custody of such records" to maintain a separate record of "all individuals . . . agencies, or organizations which have requested or obtained access to a student's education records."

Read consistently with the decision of the court of appeals, § 1232g(b)(4)(A) would require every teacher to keep a *separate record* for each of his or her students to indicate all individuals, agencies, or organizations "which have requested or obtained access" to that student's scored homework or in-class assignments and identifying "the legitimate interest that each such person, agency, or organization has in obtaining this information." It can hardly be suggested that Congress intended to task every public school teacher in the nation with the responsibility of maintaining an entirely new set of records to reflect requests for access to a student's course work and the "legitimate interest" of each person or entity requesting such access.

Moreover, FERPA unambiguously requires that this record of access be kept not only to identify the persons or entities that were allowed access to a student's homework papers on in-class work but also every person or entity that *requests* such access. Congress certainly must

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school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

20 U.S.C. § 1232g(b)(4)(A) (emphasis added).

have known that this potentially could be a very burdensome requirement.[12]

Most telling, however, is the fact that in § 1232g(b)(4)(A), Congress expressly called for a single school official (and his assistants) to be "responsible for the custody" of education records. Clearly, this language reflects a Congressional intent that there be a *central custodian* of education records at each educational agency.

By acknowledging that one official is to be "responsible for the custody" of education records under § 1232g(b)(4)(A), Congress clearly intended to limit "education records" to the institutional records that an educational agency permanently maintains. Under this construction of FERPA, the official "responsible" for these education records is clearly the educational agency's registrar.

Thus, Congress' use of the word "maintained" in the definition of "education record" clearly means "maintained" in an educational agency's *permanent, institutional records*, and not "maintained" in the sense of recorded on a student's paper "to allow the teacher to use the grade in some fashion," as the court of appeals concluded (App., *infra* A-24).

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[12] The court of appeals responded to this point in its modified opinion by suggesting that nothing in its opinion "would prohibit a central custodian from maintaining the access records" (App., *infra* A-28). Petitioners submit that it is highly implausible, to say the least, to read FERPA as making each classroom teacher a custodian of "education records," yet delegating to a "central custodian" the task of keeping – not the "education records" themselves – but the records of requests for access to the education records.

This interpretation of FERPA is perfectly consistent with the practices of educational agencies across America, with which Congress must be presumed to have been familiar. An educational agency's registrar is commonly "responsible for custody" of the permanent, institutional records of that educational agency, and the registrar often has assistants who share the responsibility for these duties.

Thus, the express language of § 1232g(b)(4)(A) indicates that Congress intended that FERPA apply only to the permanent, institutional records maintained by an educational agency, and not to the homework, quizzes, and tests evaluated by a teacher in the daily performance of his or her teaching duties. Because the court of appeals' interpretation of this important federal statute is wholly at odds with the plainly expressed intent of Congress, this Court should grant certiorari and review the decision of the lower court.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

KRISTJA J. FALVO, as parent and next friend of her minor children, Elizabeth Pletan, Philip Pletan and Erica Pletan; and on behalf of others similarly situated,

Plaintiff-Appellant,

v.

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a, Owasso Public Schools; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal; JOHN DOE, sued as: Does 1 through 50,

Defendants-Appellees.

No. 99-5130
(Filed Oct. 4, 2000)

Appeal from the United States District Court
for the N. District of Oklahoma
(D.C. No. 98-CV-765-K)

Wilfred K. Wright, Jr., of Tulsa, Oklahoma, for Appellant.

Karen L. Long, of Rosenstein, Fist & Ringold, Tulsa, Oklahoma, (Jerry A. Richardson with her on the brief), for Appellees.

Before **LUCERO, McKAY,** and **MURPHY,** Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

In the instant case, this court must decide whether a practice employed by pre-secondary school[1] teachers in the Owasso Independent School District (the "School District") of allowing their students both to grade one another's tests and other work and to call out their own grades in class (the "grading practice") violates either the Fourteenth Amendment to the United States Constitution or the Family Education Rights and Privacy Act ("FERPA"). Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we conclude that although the Fourteenth Amendment does not preclude the grading practice, FERPA does. The individual defendants, however, are entitled to qualified immunity because it was not clearly

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[1] The record indicates that the plaintiff students were in the sixth through eighth grades during the relevant time period and that this school district has a different school for each of these grades. We thus employ the term "pre-secondary school" to encompass the institutions attended by all three children.

established law that the grading practice violated FERPA. This court therefore **affirms** the district court's grant of summary judgment in favor of all defendants on the constitutional claim and **reverses** the grant of summary judgment in favor of the School District on the FERPA claim. Also as to the FERPA claim, we **affirm** the grant of summary judgment in favor of the individual defendants on the plaintiff's claim for monetary relief, but **reverse** the judgment on the plaintiff's claim for injunctive relief.

II. BACKGROUND

Kristja J. Falvo is the mother of Elizabeth, Philip, and Erica Pletan, who all attended school in the School District. Falvo learned that a number of her children's teachers would sometimes have their students grade one another's work assignments and tests and then would have the students call out their own grades to the teacher. During the 1997-98 and 1998-99 school years, Falvo complained about this grading practice to school counselors and to the School District superintendent, claiming it severely embarrassed her children by allowing other students to learn their grades. Although Falvo was told that her children always had the option of confidentially reporting their grades to the teacher,[2]

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[2] Falvo has not asserted that the distinct practice of calling out grades in class constitutes a violation of the Constitution and FERPA, independent of the process of having children exchange papers for grading. In fact, she testified that the calling out of her children's grades did not really matter because the prior act of one student grading another's paper itself constitutes a disclosure. As a consequence, this court need not determine whether the challenge to the practice of calling out

the School District refused to disallow the grading practice.

In October 1998, when Falvo's children were in the sixth, seventh, and eighth grades, she brought a class action lawsuit pursuant to 42 U.S.C. § 1983 against the School District, Superintendent Dale Johnson, Assistant Superintendent Lynn Johnson, and Principal Rick Thomas (the "individual defendants"), alleging the grading practice violated Fourteenth Amendment privacy rights and FERPA. Before the district court resolved whether to certify the class, Falvo moved for declaratory and summary judgment on her two claims. The School District filed a cross-motion for summary judgment on both claims. The district court applied the test articulated in *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989) and concluded the grading practice did not implicate a constitutionally-protected privacy interest. Additionally, the district court ruled that the grades subject to the grading practice do not constitute "education records" under FERPA. Thus, the district court granted summary judgment in favor of all defendants on both claims.

Falvo then moved for reconsideration and clarification of the district court's judgment, arguing the court should have granted relief in favor of Philip Pletan on the Fourteenth Amendment claim because, as a special education student, he had a legitimate expectation of privacy in his grades under the Individuals with Disabilities Education Act ("IDEA"). The district court

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grades in class is resolved by the option which the School District provided Falvo's children to privately report their own grades to the teacher.

denied that motion, concluding that because Falvo did not make a distinct claim under IDEA, she could not premise a Fourteenth Amendment claim on that statute.

On appeal, Falvo asserts the district court erroneously granted summary judgment in favor of the defendants, because the grading practice violates both the Fourteenth Amendment and FERPA.

III. DISCUSSION

A. Standard of Review

This court conducts a *de novo* review of a district court's summary judgment decision. *See Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1097 (10th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, this court views the evidence and draws reasonable inferences therefrom in a light most favorable to the party opposing summary judgment. *See Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 450 (10th Cir. 1996). Although the instant case involves cross-motions for summary judgment, this court nonetheless views the evidence in a manner most favorable to Falvo, because she is the party challenging the district court's grant of summary judgment.

B. The Fourteenth Amendment Claim

Falvo contends the right to privacy under the Fourteenth Amendment prohibits public disclosure of students' grades. She thus argues the district court erred in dismissing her Fourteenth Amendment claim because the grading practice employed by her children's teachers impermissibly infringes upon that constitutional privacy right. Although this court acknowledges the existence of a Fourteenth Amendment right to prevent disclosure of certain types of personal information, the school work and test grades of pre-secondary school students do not rise to the level of this constitutionally-protected category of information.

In relevant part, the Fourteenth Amendment states, "nor shall any State deprive any person of . . . liberty . . . without due process of law." U.S. Const. Amend. XIV, § 1. In *Roe v. Wade*, the Supreme Court announced that a constitutional "right of privacy . . . [is] founded in the Fourteenth Amendment's concept of personal liberty." 410 U.S. 113, 153 (1973). Subsequently, the Court noted that one type of constitutionally-protected privacy right "is the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *see also Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977).

In assessing whether a specific category of information is constitutionally protected, this court "must consider, (1) if the party asserting the right has a legitimate expectation of privacy [in that information], (2) if disclosure serves a compelling state interest, and (3) if

disclosure can be made in the least intrusive manner."[3] *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981); *see also Flanagan*, 890 F.2d at 1570. Although this test's formulation seems to indicate this court must consider all three factors, the actual application of the test in prior cases demonstrates that we need not address the second and third factors if the first is not met. *See Nilson v. Layton City*, 45 F.3d 369, 371 (10th Cir. 1995) ("Because the alleged unconstitutional conduct in this case fails to meet the first prong of this test, we hold that Mr. Nilson has no constitutional privacy in his expunged criminal record."); *Flanagan*, 890 F.2d at 1571

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[3] This test differs significantly from the analysis employed to determine the constitutionality of governmental infringement of other types of liberty interests. In these other contexts, a court first ascertains whether a liberty interest exists. *See, e.g., Seamons v. Snow*, 84 F.3d 1226, 1234-35 (10th Cir. 1996). Similarly here, this court must first determine whether the claimant possessed a form of liberty interest, a legitimate expectation of privacy in the information sought to be protected. *See Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981). The tests, however, diverge at this point. In the usual Fourteenth Amendment liberty analysis, a court, having resolved that a liberty interest exists, then determines the degree of importance of that liberty interest in order to decide which level of analytical scrutiny to apply. *See, e.g., United States v. Deters*, 143 F.3d 577, 583 (10th Cir. 1998). Under the test articulated in *Lichtenstein*, once a legitimate expectation of privacy is established, the court must automatically subject the governmental deprivation to strict scrutiny without ever determining whether the expectation of privacy constitutes a fundamental right. *See Lichtenstein*, 660 F.2d at 435; *see also infra* note 4 (noting a further distinction between this court's jurisprudence regarding the constitutional right to have personal information protected and other types of Fourteenth Amendment liberty interests).

("Since we hold that the information released by Chief Munger is not of a highly personal nature, we deny the plaintiffs' privacy claim."). In other words, if Falvo and her children do not have a legitimate expectation of privacy in the children's school work and test grades, they have no Fourteenth Amendment privacy right protecting those grades from disclosure.

A party's expectation in the privacy of specific information is sufficiently legitimate to warrant constitutional protection only if that information "is highly personal or intimate." *Nilson*, 45 F.3d at 372. Although this court acknowledges that the school work and test grades of pre-secondary school students constitute somewhat personal or intimate information, we cannot conclude that these grades are so highly personal or intimate that they fall within the zone of constitutional protection; to hold otherwise would trivialize the Fourteenth Amendment. *Accord Alexander v. Peffer*, 993 F.2d 1348, 1350-51 (8th Cir. 1993); *Davis v. Bucher*, 853 F.2d 718, 721 (9th Cir. 1988); *see generally Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that even the Supreme Court "must . . . exercise the utmost care" when asked to announce a new substantive due process right (quotation omitted)).

Falvo contends that she and her children have a legitimate expectation of privacy in these grades because two federal statutes, FERPA and IDEA, provide just such an expectation. This court has recognized that "[t]he presence of privacy statutes and regulations may inform our judgment concerning the scope of the constitutional right to privacy." *Flanagan*, 890 F.2d at 1571. In several prior public disclosure cases, however, this court has

refused to premise a constitutional privacy right merely on the existence of state privacy statutes. *See id*; *Nilson*, 45 F.3d at 372; *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986). In one such case, this court explained, "Rights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution. . . . Any disclosed information must itself warrant protection under constitutional standards." *Mangels*, 890 F.2d at 839. This court therefore must similarly conclude that federal privacy statutes standing alone cannot be the basis for a Fourteenth Amendment right to prohibit disclosure of personal information.[4] Thus, contrary to Falvo's contention, neither FERPA nor IDEA can create a Fourteenth Amendment privacy right; rather, the grades themselves must warrant constitutional protection.

Although this court's conclusion, discussed *infra*, that FERPA prohibits revelation of students' school work and test grades informs our judgment about the scope of the constitutional right to prevent disclosure of personal information, we cannot say the right to prevent disclosure of pre-secondary school work and test grades

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[4] We acknowledge the possible inconsistency between such precedent and both the legitimate expectation of privacy test itself and other Tenth Circuit case law which holds that constitutionally-protected liberty interests can spring from statutes. *See, e.g., Wildermuth v. Furlong*, 147 F.3d 1234, 1237 (10th Cir. 1998). Nonetheless, this court is bound by this Circuit's controlling authority in this particular area of Fourteenth Amendment jurisprudence. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

is a "deeply rooted notion[ ] of fundamental personal interest[ ] derived from the Constitution."[5] *Mangels*, 890 F.2d at 839. Falvo and her children therefore lack a sufficiently legitimate expectation of privacy in those grades to claim a constitutional right in their protection. This court thus concludes the district court properly granted summary judgment in favor of the defendants on Falvo's Fourteenth Amendment claim.

C. FERPA Claim

1. Jurisdiction

Although most courts have concluded that a violation of FERPA may be the basis for a civil rights lawsuit under 42 U.S.C. § 1983, the parties have not raised that issue in the instant case. *See Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp.2d 664, 672-74 (D. Minn. 1999); *Doe v. Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996); *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1107 (D.S.D. 1995); *Belanger v. Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 47-48 (D.N.H. 1994); *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991). *But see Gundlach v. Reinstein*, 924 F. Supp. 684,

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[5] This court need not resolve whether IDEA similarly prohibits the grading practice, because even if the grading practice does violate that statute, we still could not conclude that the right to prevent disclosure of these grades is a "deeply rooted notion[ ] of fundamental personal interest[ ] derived from the Constitution." *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986).

692 (E.D. Pa. 1996); *Norris v. Board of Educ. of Greenwood Community Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992). Whether the alleged violation of FERPA is actionable under 42 U.S.C. § 1983, however, may implicate this court's and the district court's subject matter jurisdiction over Falvo's FERPA claim. *See Duke v. Absentee Shawnee Tribe of Okla. Hous. Auth.*, 199 F.3d 1123, 1126 (10th Cir. 1999) ("Federal question jurisdiction exists when a cause of action 'aris[es] under the Constitution, laws, or treaties of the United States.' " (quoting 28 U.S.C. § 1331)), *cert. denied*, 120 S. Ct. 2014 (2000); *see also Ackerley Communications of Fla., Inc. v. Henderson*, 881 F.2d 990, 993 (11th Cir. 1989) (dismissing for lack of subject matter jurisdiction a claim premised on the violation of a federal statute because § 1983 does not provide a remedy for a violation of that particular statute); *Belanger*, 856 F. Supp. at 42 ("Before addressing the question of whether the requested records are 'education records' as defined by FERPA . . . , the court *must determine* whether the plaintiff has a cause of action under § 1983 for the alleged violation of [this] statute[ ]." (emphasis added)). Because the issue was not raised by the parties, this court does not decide if subject matter jurisdiction hinges on whether a federal statute is remediable under § 1983 or if that question is more properly resolved pursuant to Federal Rule of Civil Procedure 12(b)(6). Heeding the lesson of *Steel Company v. Citizens for a Better Environment*, we will assume, without deciding, that subject matter jurisdiction is implicated by the question whether § 1983 provides a remedy for the alleged FERPA violation and thus resolve that question before addressing the merits of Falvo's FERPA claim. *See* 523 U.S. 83, 95 (1998)

(discussing federal appellate court's duty to decide whether it has jurisdiction, even when jurisdiction is not challenged by parties, before addressing the merits of the appeal).

In *Wilder v. Virginia Hosp. Ass'n*, the Supreme Court stated, "A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself."[6] 496 U.S. 498, 508 (1990) (quotations omitted). To resolve the first part of this test, this court must decide

> whether the provision in question was intend[ed] to benefit the putative plaintiff. If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

Id. at 509 (citations and quotations omitted).

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[6] Some courts have concluded that in *Suter v. Artist M.*, 503 U.S. 347 (1992), the Supreme Court imposed additional requirements upon this analytical framework. *See, e.g., Albiston v. Maine Comm'r of Human Servs.*, 7 F.3d 258, 262-63 (1st Cir. 1993). This court, however, has held that any analytical additions announced in *Suter* are "no longer to be followed" in light of post-*Suter* Congressional action. *Stanberry v. Sherman*, 75 F.3d 581, 584 (10th Cir. 1996); *see also Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (employing the pre-*Suter* analytical framework).

The plain language of the relevant provision of FERPA, 20 U.S.C. § 1232g(b)(1), reveals that it is intended to protect the privacy of students and their parents. Moreover, the sponsors of the amendment to FERPA which added this particular provision stated, "The purpose of the Act is two-fold – to assure parents of students . . . access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." 120 Cong. Rec. 39862 (Dec. 13, 1974) (Joint Statement in Explanation of Buckley/Pell Amendment). The relevant provision of FERPA, therefore, was intended to benefit Falvo and her children. Additionally, this provision reflects a binding obligation on schools, rather than a mere Congressional preference for a certain kind of conduct. Under the provision, an educational agency or institution is absolutely precluded from receiving federal funds if it maintains a policy or practice of allowing disclosure of education records to unauthorized individuals or entities without parental consent. *See* 20 U.S.C. § 1232g(b)(1). The language of this provision is akin to other statutory language which the Supreme Court has interpreted as creating "precise requirements." *Suter v. Artist M.*, 503 U.S. 347, 361 n.12 (1992); *see also Belanger*, 856 F. Supp. at 46, 47. Finally, as this court's statutory analysis, *infra*, makes clear, the interest which Falvo asserts is neither vague nor amorphous and is thus within the competence of the judiciary to enforce. We therefore conclude 20 U.S.C. § 1232g(b)(1) creates an enforceable right within the meaning of § 1983.

This conclusion raises a rebuttable presumption, under the second part of the *Wilder* test, that Congress did not

impliedly foreclose a § 1983 remedy by creating a comprehensive remedial scheme within FERPA itself.[7] *See Blessing v. Freestone*, 520 U.S. 329, 341 (1997); *Wilder*, 496 U.S. at 520-21. "We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 423-24 (1987) (quotation omitted). In only two cases has the Supreme Court concluded that a sufficiently comprehensive scheme exists within a statute to demonstrate Congress' intent to foreclose a § 1983 remedy. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-20 (1981); *Smith v. Robinson*, 468 U.S. 992, 1011 (1984), *overruled by statute on other grounds as recognized in Fontenont v. Louisiana Bd. of Elementary and Secondary Educ.*, 805 F.2d 1222, 1223 (5th Cir. 1986). The statutes in both of those cases contained extensive remedial schemes, including noncompliance orders, local administrative procedures, civil suits, and criminal penalties. *See Sea Clammers*, 453 U.S. at 13-14; *Smith*, 468 U.S. at 1009. FERPA's remedial scheme is far more limited.

The only remedy Congress provided within FERPA itself is allowing the Secretary of Education to cut off federal funding to educational institutions that violate the statute. *See* 20 U.S.C. § 1232g(b), (f). In FERPA, Congress also directed the Secretary of Education to "establish or designate an office and review board within the Department [of Education]" to investigate, process,

[7] Congress did not "expressly . . . forbid[ ] recourse to § 1983 in the statute itself." *Blessing*, 520 U.S. at 341.

review, and adjudicate FERPA violations and complaints alleging such violations. *See id.* § 1232g(g). The Department of Education, in accordance with Congress' directive to "take appropriate actions to enforce" FERPA, has promulgated regulations which establish more detailed administrative proceedings through which a parent or student may seek to remedy a FERPA violation. *Id.* § 1232g(f); *see* 34 C.F.R. §§ 99.60-.67. Ultimately, however, the only remedy which a complaining parent or student may obtain through these proceedings is the same which Congress itself set out in the statute: the Secretary of Education may terminate the violating institution's federal funding. *See* 34 C.F.R. § 99.67.

In *Wright*, the Supreme Court concluded that an administrative scheme in the federal Housing Act, which provided the administering agency the power to audit, enforce contracts, *and cut off federal funds*, was "insufficient to indicate a congressional intention to foreclose § 1983 remedies." 479 U.S. at 428; *see also Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 522. Pursuant to Supreme Court precedent, therefore, this court must conclude that the only remedy provided for in FERPA and its associated regulations – the termination of federal funding – is not sufficiently comprehensive to "raise a clear inference" of Congressional intent to foreclose a § 1983 remedy. *Wright*, 479 U.S. at 425; *see also Fay*, 802 F.2d at 33 ("Although FERPA authorizes extensive enforcement procedures created by regulation, these regulations do not demonstrate a congressional intent to preclude suits under section 1983 to remedy violations of FERPA." (citation omitted)); *Achman*, 45 F. Supp.2d at 673-74; *Maynard*, 876 F. Supp. at 1107.

This court, therefore, has subject matter jurisdiction over Falvo's appeal of the district court's dismissal of her FERPA claim, because the specific violation of FERPA which she alleged is actionable under § 1983.

2. *Merits*

In assessing Falvo's claim under FERPA, this court shifts its analytical mode from that employed in resolving her constitutional claim. When asked to pronounce the existence of a previously unrecognized constitutional right, this court must proceed with great caution, because "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720.[8] Constitutional scrutiny is thus cloaked in a "backdrop of history, tradition, and practice"; it requires vigilance that the examination is not subtlely driven by the personal "policy preferences of the [m]embers of [the] [c]ourt,"

[8] This court recognizes that in *Washington v. Glucksberg*, the question presented was whether the Constitution itself created a liberty interest in physician-assisted suicide. *See* 521 U.S. 702, 705-06 (1997). Under the law of this Circuit, a constitutionally-protected liberty interest in the non-disclosure of personal information can only arise from the Constitution and not from federal or state statutes and regulations. *See supra* notes 3-4 and accompanying text. For that reason, *Glucksberg* is relevant to resolving Falvo's constitutional claim. The applicability of *Glucksberg*, however, is not as clear in other areas of Fourteenth Amendment jurisprudence in which a statute can create a constitutionally-protected liberty interest and the only question is whether the Constitution limits the manner in which that interest can be deprived. *See supra* note 4.

unelected public officials. *Id.* at 719, 720. Statutory analysis, however, is differently clad: the court weighs the words of elected legislators to resolve their meaning. This court must go wherever the language and intent of the statute take us. Should our interpretation cause public discomfort or impose undesired burdens, it is to the source of the enactment, Congress, that those who are discomforted or burdened must turn for relief. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). With that approach in mind, we proceed to examine Falvo's claim under FERPA.

FERPA prohibits educational agencies or institutions from maintaining "a policy or practice of permitting the release of *education records* (or personally identifiable information contained therein . . .) of students without the written consent of their parents" to anyone other than statutorily-designated authorities or individuals, which does not include other students. 20 U.S.C. § 1232g(b)(1) (emphasis added). The statute defines "education records" as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are *maintained* by an educational agency or institution or by a person acting for such agency or institution." *Id.* § 1232g(a)(4)(A) (emphasis added).

The district court granted the School District's summary judgment motion on Falvo's FERPA claim because it concluded the grades of Falvo's children which were revealed to other students were not "maintained" by the School District and thus do not constitute "education records" within the meaning of FERPA. In so ruling, the district court gave deference to the interpretation set out

both in a 1993 letter (the "Rooker letter")[9] written by LeRoy S. Rooker, the Director of the Family Policy Compliance Office ("FPCO") within the United States Department of Education, and in a 1999 sworn declaration by Rooker (the "Rooker declaration") that the Rooker letter states the current position of the FPCO regarding the grading practice. On appeal, Falvo contends the district court both improperly deferred to the interpretation in the Rooker letter and Rooker declaration and misconstrued the statute. This court agrees with both of these contentions and thus concludes that the district court erroneously determined the term "education records" within FERPA does not encompass the grades at issue here.

The district court erred in granting deference to the Rooker letter and declaration for two reasons. First, as discussed *infra*, the meaning of the terms "education records" and "maintain" are clear from the statute itself, and a court can only defer to an agency's interpretation if a statute is deemed ambiguous. *See Chevron, U.S.A., Inc. v.*

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[9] The Rooker letter was drafted in response to inquiries made by a union representative of the New York State United Teachers about the legality under FERPA of certain practices by school officials. It states,

> FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (holding that when a court is asked to construe an ambiguous statute, it must defer to the interpretation set out in a regulation promulgated by the agency charged with administering the statute, so long as the agency's interpretation is reasonable). Second, even if the relevant statutory language was ambiguous, the Supreme Court recently announced that *Chevron* deference does not extend to an interpretation contained in an opinion letter issued by the administering agency. *See Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000). The district court thus erred in affording *Chevron* deference to the Rooker letter and declaration.

The Supreme Court did state, however, that interpretations contained in agency opinion letters "are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)." *Christensen*, 120 S. Ct. at 1663. In *Skidmore*, the Court earlier stated that the weight which a court should afford such non-binding agency interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. Even if the language of FERPA was ambiguous, the Rooker letter and declaration would carry minimal persuasive power under *Skidmore*.

A statement of qualification contained earlier in the letter indicates that in issuing the opinion, the FPCO may not have thoroughly considered the issue before this court. That portion of the letter states,

> Because you do not fully explain the details surrounding the activities you identify, it would not be appropriate for this Office to comment on whether the District's participation in the activities would violate rights afforded parents by FERPA. However, below is a general discussion of FERPA as it relates to the types of activities you present.

Additionally, the Rooker letter and declaration are bereft of any reasoning underlying the rather conclusory opinion that grades written down by other students and announced to the teacher are not "maintained" as required under FERPA. The Rooker letter's power to persuade is further diminished because it rests its statutory interpretation on the conclusion that the grades are not " 'maintained' by an educational agency or institution," ignoring the broader language of FERPA which encompasses records "maintained by an educational agency or institution *or by a person acting for such agency or institution*." 20 U.S.C. § 1232g(a)(4)(A)(ii) (emphasis added). The Rooker declaration, however, which was submitted in the instant case over five years after the Rooker letter was issued, at least indicates the FPCO's interpretation of FERPA as it relates to the grading practice has been consistent for some time. Nonetheless, because the Rooker letter and declaration lack sufficient reasoning, fail to account for the breadth of FERPA's language, and indicate the FPCO's somewhat cursory and purely hypothetical consideration of the issue before this court, the interpretation of FERPA offered in those documents is not persuasive.

Based purely on the language of the statute itself, this court concludes the grades which students record on one

another's homework and test papers and then report to the teacher[10] constitute "education records" under FERPA. The statute provides that "education records" are "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained . . . by a person acting for [an educational] agency or institution." *Id.* § 1232g(a)(4)(A). There is no dispute that the grades which students place on each other's papers and then report to the teacher "contain information directly related to a student" and thus satisfy the first element of the statutory definition for "education record." *Id.* § 1232g(a)(4)(A)(i). To constitute an "education record," however, these grades must also be "maintained . . . by a person acting for [an educational] agency or institution." *Id.* § 1232g(a)(4)(A)(ii).

The undisputed evidence indicates that at least some grades which students give one another and report to the teacher are then recorded in the teacher's grade book. At that later time when the grades are placed in the teacher's grade book, they are "maintained . . . by a person acting for [an educational] agency or institution" and constitute "education records." *Id.* FERPA itself provides, "The term 'education records' does not include [ ] records of instructional . . . personnel . . . which are in the sole possession of the maker thereof *and which are not accessible or revealed to any other person except a*

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[10] As mentioned *supra* note 2, the method of reporting the grade is irrelevant to our analysis, because a disclosure occurs at the earlier stage when one student grades the work of another.

substitute. . . . " Id. § 1232g(a)(4)(B)(i) (emphasis added). This language explicitly provides that records of instructional personnel, such as grade books, do not constitute "education records" *only* if they "are not accessible or revealed to any other person except a substitute." *Id.* Therefore, grade books disclosed to people other than substitute teachers, such as students, do qualify as education records. Because grade books, except those disclosed only to substitutes, fall within the statutory definition of "education records" and because one element of that definition is that the records are "maintained," grade books and the grades within are necessarily "maintained" by a person acting for the educational institution, as required by FERPA.

The School District contends the language of § 1232g(a)(4)(B)(i) categorically excludes grade books, and hence, the grades at issue in the instant case, from the definition of "education records." The School District's proposed construction of this provision, however, defies both the plain language of this provision and a well-settled rule of statutory construction. "[A] statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). If § 1232g(a)(4)(B)(i) excludes records such as grade books from the definition of "education records" in an unqualified manner, as the School District urges, the language "and which are not accessible or revealed to any other person except a substitute" becomes meaningless. If grade books never constitute "education records," teachers would be free under FERPA to reveal

them to anyone, thus obviating the need to provide in the statute for allowing disclosure to substitute teachers.

In its petition for rehearing, the School District argues that interpreting § 1232g(a)(4)(B)(i) as merely allowing for the disclosure of grade books to substitutes, as this court does, "renders subsection 1232g(a)(4)(B)(i) superfluous, because subsection 1232g(b)(1)(A) already provides that it is not a violation of FERPA to allow access to education records" by substitute teachers. As just explained, however, it is the School District's construction of § 1232g(a)(4)(B)(i) which renders language within that subsection meaningless. This court's interpretation of § 1232g(a)(4)(B)(i) does not suffer that same malady.

It is important to note that FERPA serves two general purposes: (1) prohibiting disclosure of private education records, the aspect of FERPA at issue in the instant case; and (2) providing parents access to their children's education records. *See id.* § 1232g(a)(1)(A), (b)(1). In light of this second purpose, § 1232g(a)(4)(B)(i), as interpreted by this court, means that a teacher may reveal a grade book to a substitute teacher without being required to also disclose that grade book to a parent; if, however, the teacher reveals the grade book to anyone other than a substitute, the grade book becomes an "education record" to which a parent gains the right to access. The School District, therefore, is wrong to assert that § 1232g(a)(4)(B)(i), which allows a teacher to disclose a grade book to a substitute only, is superfluous because such disclosure is already permitted under § 1232g(b)(1)(A). Section 1232g(a)(4)(B)(i), unlike § 1232g(b)(1)(A), permits a teacher to reveal a grade book

to a substitute *without having to also show it to a parent.* Contrary to the School District's challenge, therefore, our interpretation of § 1232g(a)(4)(B)(i) does not render that subsection superfluous, but is, in fact, the only reasonable way to construe that provision.

This court must next resolve whether grades are also "maintained . . . by a person acting for [an educational] agency or institution" at the more preliminary stage when one student simply writes the grade of a fellow student on homework and test papers. *Id.* § 1232g(a)(4)(A)(ii). The student's transmission of that recorded grade, when the teacher later receives that grade, is necessarily done to allow the teacher to use the grade in some fashion.[11] In so assisting the teacher, the correcting student becomes a "person acting for [an educational] agency or institution." *Id.* The grade the correcting student places on the paper is also "maintained," because that student is preserving the grade until the time it is reported to the teacher for further use. In sum, the grades which students mark, at the teacher's direction, on each other's homework and test papers and later report to the teacher are "maintained . . . by a person acting for [an educational] agency or institution." *Id.* This interpretation of FERPA is consistent with Congress' intent to protect from

[11] The teacher might use the grade by recording it in a grade book to calculate the student's final grade. Even if the homework or test grade never figures into the student's final grade, the teacher must still receive the grade to use it for some other purpose, perhaps to preserve, in a grade book or otherwise, a yardstick of each student's performance and progress to better develop effective teaching strategies.

disclosure grades in a teacher's grade book. If Congress intended FERPA to preclude a teacher from revealing to one student the grades of another when written in a grade book, it would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book or noting them in some similar way which serves the same purposes as a grade book record.

In its petition for rehearing, the School District argues, for the first time, that two provisions within FERPA, 20 U.S.C. §§ 1232g(a)(2), 1232g(b)(4)(A), undermine our statutory interpretation. This court is first unconvinced that in resolving whether particular documents constitute education records within the meaning of FERPA, we need to look beyond the statutory definition for the term "education records" when that definitional section provides a clear answer. Moreover, this court disagrees with the School District that these two provisions demonstrate Congressional intent to exclude student-graded work from the definition of "education records."

Section 1232g(a)(2) states that educational institutions must provide parents "an opportunity for a hearing . . . to challenge the content of . . . education records." The School District asserts that Congress could not have reasonably intended to allow parents to challenge in a hearing the accuracy of a grade placed on a student's homework or test by another student. The School District, relying on a statement from the legislative history, contends Congress only meant to afford parents a procedural right to challenge "institutional records."

To the contrary, Congress could have sensibly intended to provide parents a means to challenge the accuracy of grades on individual homework and test papers. Indeed, a challenge to "institutional records" such as a semester grade might necessarily require an investigation into the accuracy of the individual homework and test grades used to calculate the final semester grade. Moreover, the notion that a parent should have a right to raise such a challenge is neither beyond the pale of possible Congressional intent, nor does it "trivialize" such intent, as the School District asserts. Imagine a student who, perhaps out of juvenile malice, consistently records grades on another student's papers which are lower than that which the student actually earned. Such inaccurate student grading could significantly impact the slighted student's more permanent grades. In such a situation, a parent has a definite and strong need to challenge the accuracy of the student-recorded grades. Under this court's view, FERPA provides the necessary recourse. Reading § 1232g(a)(2) on its face, therefore, does not, as the School District contends, illuminate the meaning of the term "education records."

As to the legislative history noted by the School District, this court need not test those murky waters because we conclude the statutory language defining "education records" is clear on its face. It is because expressions in legislative history often lack the precision and clarity which we expect from the language of enacted statutes that this court generally does not look to such history when construing a statute unless the statutory language itself is ambiguous. *See United States v. Ron-Pair Enterprises*, 489 U.S. 235, 241-42 (1989); *Starzynski v.*

Sequoia Forest Indus., 72 F.3d 816, 820 (10th Cir. 1995). Even if this court were to consider legislative history, we are unconvinced that the cited reference to "institutional records" demonstrates a clear Congressional intent to limit the meaning of "education records" to "centralized, cumulative records." The enacted definition of "education records" within FERPA makes no reference to "institutional," "centralized," or "cumulative" records. *See* 20 U.S.C. § 1232g(a)(4).

Finally, this court disagrees that § 1232g(b)(4)(A)[12] vitiates our statutory construction. The School District asserts that this provision, in light of our conclusion that the term "education records" encompasses student-recorded grades which are provided to the teacher, would require *individual teachers* to maintain a record (an "access record") indicating every individual or entity which has

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[12] Section 1232 g(b)(4)(A) provides,

> Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals . . . , agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such a record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

20 U.S.C. § 1232g(b)(4)(A).

requested or obtained access to the student's graded homework or tests and identifying that person's or entity's interest in accessing the student's education records. Such a requirement, the School District contends, runs contrary to Congress' intent expressed in § 1232g(b)(4)(A) to allow a central custodian to maintain such access records. This argument is unavailing, however, because nothing in this court's interpretation of the term "education records" would prohibit a central custodian from maintaining these access records, as the School District seems to fear.

In sum, because a reading of the plain language of FERPA demonstrates that the term "education records" encompasses the grades at issue in the instant case, this court concludes the district court erred when it resolved that the grading practice did not offend FERPA.[13]

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[13] The School District justifies the grading of homework and tests by other students on two grounds: (1) it allows immediate feedback to the students; and (2) it relieves the teacher of the time-consuming task of correcting the papers. FERPA, however, forbids neither the practice nor the benefits. The statute does not prohibit students from correcting papers if done anonymously or with the consent of parents. *See* 20 U.S.C. § 1232g(b)(1). Furthermore, the evidence establishes that not all teachers have their students grade one another's work. As a consequence, there necessarily exist further alternatives to the practice of having students correct other students' papers without parental consent or anonymity. In its petition for rehearing, the School District itself recognized two additional techniques which teachers may employ to avoid liability – collecting and passing out papers themselves or placing graded papers in sealed envelopes. There are still other means by which teachers can continue to work efficiently and effectively without violating FERPA. For example, if a teacher would like one student to collect from the others self-graded papers, the teacher can simply direct the students to turn their papers over so the grade is not revealed. Similarly, if a teacher does not wish to personally hand out graded papers, the teacher may have the students come to retrieve the papers one at a time, so they do not see each others' grades; alternatively, the teacher could fold over the papers to conceal the students' grades but not their names and thus allow a student to hand back the papers. The School District's protestations that this opinion somehow marks the end of the world for teachers, therefore, are far exaggerated.

D. Qualified Immunity

In their cross-motion for summary judgment, the individual defendants argued they are entitled to qualified immunity. Despite ruling that the grading practice violated neither the Fourteenth Amendment nor FERPA, the district court concluded that qualified immunity does not protect the individual defendants because "the rights of privacy under FERPA and the Fourteenth Amendment were clearly established at the time of the alleged violations." On appeal, the individual defendants contend the district court's qualified immunity ruling was erroneous and that qualified immunity provides an alternative basis to affirm the district court's summary judgment ruling in favor of those individuals. Contrary to Falvo's assertion that this issue is not properly before this court because the individual defendants failed to file a cross-appeal, this court may affirm the district court's ruling on any basis supported by the record. *See Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990) ("Because we may affirm the trial court's decision on any grounds supported in the record,

we proceed to consider the qualified immunity defense.").

When a public official raises a qualified immunity defense in a § 1983 lawsuit, the plaintiff bears the burden of establishing (1) "that the defendant's actions violated a federal constitutional or statutory right," and (2) "that the right violated was clearly established at the time of the conduct at issue." *Horstkoetter v. Department of Pub. Safety*, 159 F.3d 1265, 1277, 1278 (10th Cir. 1998) (quotation omitted). Having concluded that the grading practice violates FERPA, this court must further determine whether Falvo has demonstrated that the right she and her children enjoy under FERPA was clearly established at the time the individual defendants permitted the grading practice.

A right is "clearly established" when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "Although a plaintiff need not show that the very action in question was previously held unlawful, she must demonstrate that there is a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Horstkoetter*, 159 F.3d at 1278 (quotation and citation omitted). Falvo has presented no case law whatsoever which concludes that FERPA creates a right to prevent the disclosure of homework, test, or similar grades, nor is this court aware of any such legal authority. Moreover, although this court does not deem the Rooker letter or declaration to be persuasive, the FPCO's statutory interpretation contained

in those documents suggests that the right which we elucidate today was not clearly established. The individual defendants are thus entitled to qualified immunity in the instant suit.[14] Because the qualified immunity doctrine only protects these individual defendants from liability for monetary damages and not from injunctive remedies, however, Falvo may pursue a claim for injunctive relief against these individual defendants in their official capacities. *See Jones v. City & County of Denver*, 854 F.2d 1206, 1208 n.2 (10th Cir. 1988);

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[14] We recognize the existence of authority, albeit not in this Circuit, which holds that qualified immunity is unavailable to a defendant who violates a right arising from an unambiguous statute. *See Jackson v. Rapps*, 947 F.2d 332, 339 (8th Cir. 1991). That rule does not apply in the instant case, however, because prior to this court's construing FERPA and concluding it unambiguously prohibits the grading practice, the very agency charged with administering that statute, the FPCO, had put forward a directly contrary interpretation. *See* 20 U.S.C. § 1232g(f), (g) (designating to the Secretary of Education the authority to enforce and address violations of FERPA and to establish a review board to investigate, process, review, and adjudicate such violations); 34 C.F.R. § 99.60(b) ("The Secretary [of Education] designates the [FPCO] . . . to: (1) Investigate, Process, and review complaints and violations under [FERPA] and this part; and (2) Provide technical assistance to ensure compliance with [FERPA] and this part."). We cannot expect educators to more accurately interpret a law than that law's administering agency; educators should be able to rely on the FPCO's opinions, in the absence of already existing, conflicting case law, regarding permissible practices under FERPA. To apply the rule set out by the Eighth Circuit in *Jackson* in the instant case, therefore, would undermine the purpose of qualified immunity, which aims to protect all but the objectively unreasonable. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987)

DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 718 (10th Cir. 1988).

IV. CONCLUSION

Because the grading practice which Falvo challenges does not implicate a Fourteenth Amendment right, this court **AFFIRMS** the District Court for the Northern District of Oklahoma's grant of summary judgment in favor of all defendants on the Fourteenth Amendment claim. Nevertheless, that grading practice does violate FERPA, and we thus **REVERSE** the district court's grant of summary judgment in favor of the School District on Falvo's FERPA claim.[15]

On the basis of qualified immunity, this court also **AFFIRMS** the grant of summary judgment in favor of the individual defendants on Falvo's FERPA claim for monetary relief. Because qualified immunity does not protect the individual defendants from liability for injunctive relief, however, we **REVERSE** the district court's grant of summary judgment in favor of the individual defendants on Falvo's FERPA claim for injunctive relief. This court **REMANDS** for further proceedings consistent with this opinion.

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[15] The School District, however, will only be liable if Falvo can demonstrate "that the [illegal] actions of an employee were representative of an official policy or custom of [the School District], or were carried out by an official with final policy making authority with respect to the challenged action." *Seamons v. Snow*, 206 F.3d 1021, 1028 (10th Cir. 2000).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KRISTJA J. FALVO, et al., Plaintiffs, vs. OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, et al., Defendants.	)	No. 98-C-765-K

ORDER

(Filed April 26, 1999)

Before the Court are the cross-motions of the parties for summary judgment. Plaintiffs have brought this action seeking damages and a declaratory judgment that the defendants have violated their rights under both the Fourteenth Amendment and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. The Court has previously denied plaintiffs' motion for temporary restraining order. The Court hereby incorporates by reference the findings of fact made in the Court's order of October 16, 1998.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) F.R.Cv.P. When applying this standard,

the Court views the evidence and draws reasonable inferences therefrom in the light most favorable to the non-moving party. *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998).

Plaintiffs (Kristja J. Falvo and her minor children, Elizabeth Pletan, Philip Pletan and Erica Pletan), contend that the grading practice utilized by some teachers at the Owasso School District, by which students exchange papers and grade each others' work as the teacher goes over the answers, is improper under the law. Plaintiffs also object to the practice of some teachers of permitting students to announce their grades aloud after their papers have been graded and returned.

FERPA provides in pertinent part that an educational agency or institution "which has a policy or practice of permitting the release of educational records . . . of students without the written consent of their parents" is in violation of FERPA. 20 U.S.C. § 1232g(b)(1). This provision contains certain qualifications and exceptions which are not applicable here. FERPA defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). *See also* 34 C.F.R. § 99.3.

Defendants place principal reliance upon a declaration under penalty of perjury executed by LeRoy S. Rooker. Mr. Rooker is the Director of the Family Policy Compliance Office ("FPCO") within the United States Department of Education. In the declaration, Mr. Rooker

states that the current position of the FPCO on the issue of students grading other students' papers is accurately reflected in a letter date-stamped July 15, 1993, from Mr. Rooker to Mr. Wallace N. Raupp, II. This letter was introduced into evidence before this Court during the hearing on motion for temporary restraining order. In the letter, Mr. Rooker opines that FERPA does not prohibit teachers from allowing one student to grade the paper of another student, or from calling out the grade in class.

The Secretary of Education has been delegated by Congress with the task of enforcing FERPA. 20 U.S.C. § 1232g(f). "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

The rationale of the Rooker letter is that grades on interim tests and homework assignments are not "maintained" by an educational agency or institution at the point of grading. Plaintiffs object that such an interpretation is contrary to congressional intent, because Congress has defined the word "maintain" in another statute as including any collection or use of the material. 5 U.S.C. § 552a(a)(3). Plaintiffs describe this separate statutory scheme, the Privacy Act, as "FERPA's sister statute", and apparently seek to incorporate that Act's definition into FERPA.

In the absence of definition within the statute, statutory terms are to be construed in accordance with their ordinary meaning. *Underwood v. Wilson*, 151 F.3d 292, 295 (5th Cir.1998). The term "maintain" is not defined in

FERPA; therefore, the ordinary meaning of "preserve" or "retain" is appropriate. If Congress wished to incorporate into FERPA the special definition given "maintain" in the Privacy Act, Congress knew how to do so. There is no authority holding that the Privacy Act and FERPA are to be construed in pari materia, and the Court declines to do so. In sum, the Court finds deference is due the Department of Education's interpretation of FERPA because it is reasonable and does not conflict with the expressed intent of Congress[1]. Plaintiffs' claim under FERPA fails.

Plaintiffs also bring a separate claim grounded in the Constitution itself. It is established that there is a constitutional right to privacy in preventing disclosure by the government of personal matters. *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir.1995). In resolving such a claim, the Tenth Circuit has established a three-part balancing test. The Court must consider (1) if the party asserting the right has a legitimate expectation of privacy, (2) if disclosure serves a compelling state interest, and (3) if disclosure can be made in the least intrusive manner. *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir.1989).

The *Flanagan* court affirmed a district court's grant of summary judgment against a plaintiff on the first prong

[1] The plaintiff has submitted three affidavits by experts, which argue for a contrary interpretation of FERPA. The Court finds that these largely take the form of expressing opinions as to what the law *should* be, and do not raise a genuine issue of material fact in this case. Further, as defendants note, one of the experts, Professor Friedman, has written an article in which he concedes that FERPA as written "probably" does not prohibit the public announcement of grades in the classroom. (Defendants' Exhibit B).

of the test. The court stated that there is no absolute right to privacy in the content of personnel files, but only "highly personal information" is protected. *Id.* The court found the items under review were not "highly personal" because they dealt only with the plaintiffs' work as police officers. Similarly, the interim tests and homework assignments deal with a student's performance *qua* student. In this Court's view, they are not "highly personal" matters worthy of constitutional protection.

In any event, students are given the option of having their grade related in confidence. Moreover, as this Court has previously found, students do not grade 9-week exams given at the Owasso Public Schools. No revelation is made of a letter grade on a report card or from a student's permanent transcript. Having found that the plaintiffs do not have a legitimate expectation of privacy in the items in question, the Court need not address the remaining two prongs of the balancing test. However, the Court wishes to state that it would be hard-pressed to find that this grading practice at the Owasso School District is supported by a compelling state interest. The record reflects that many teachers, even in this immediate geographical area, do not employ the student grading method. Therefore, a showing stronger than merely pronouncing "education" as a compelling state interest would have to be made before it could be demonstrated to this Court's satisfaction that the grading method under review could not undergo modification while still properly educating students. The issue before the Court is whether a constitutional violation has occurred *under these facts*, and the Court finds it has not.

In the alternative, defendants have argued that they are entitled to summary judgment based upon qualified immunity. The Court disagrees. Because the rights of privacy under FERPA and the Fourteenth Amendment were clearly established at the time of the alleged violations, the defendants are not entitled to qualified immunity. *See Mick v. Brewer,* 76 F.3d 1127, 1134 (10th Cir.1996). This is a distinct issue from whether a violation in fact took place, which the Court has already discussed.

Plaintiffs also have pending a motion for class certification. The Court elected to address the merits initially. Because the Court has found that the named plaintiffs have failed to present a claim which survives summary judgment, no ruling on class certification is necessary.

It is the Order of the Court that the motion of the plaintiffs for partial summary judgment (#16) is hereby DENIED. The cross-motion of the defendants for summary judgment (#20) is hereby GRANTED. The motion of the plaintiffs for class certification (#12) is hereby DENIED as moot.

ORDERED this 23 day of April, 1999.

/s/ Terry C. Kern
TERRY C. KERN, Chief
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KRISTJA J. FALVO, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 98-C-765-K
OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, et al.,	)	
Defendants.	)	

ORDER

(Filed Oct. 16, 1998)

This matter came on for hearing on October 14, 1998 on the motion of the plaintiffs for temporary restraining order. Upon consideration of the pleadings and the evidence presented at the hearing both by testimony and exhibit, the Court hereby enters its Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff Kristja J. Falvo is the mother of Elizabeth, Philip and Erica Pletan, three children presently enrolled in the Owasso School District. Ms. Falvo and the three children are named plaintiffs in this action.

2. Elizabeth Pletan is a 14 year old 8th grade student; Philip Pletan is a 12 year old 7th grade student; Erica Pletan is an 11 year old 6th grade student.

3. Defendant Owasso Independent School District NO. I-011 is a public school district authorized by 70 O.S. §1-101 et seq. to operate and control Owasso Public Schools.

4. Some teachers at the Owasso Public Schools, including teachers of each of the three plaintiff children, engage in the practice of having students exchange papers for grading. The teacher then asks that the grade received be orally announced by the student whose paper was graded by a fellow student. Students are supposed to be given the option of approaching the teacher to announce their grade in private. The teacher then enters the result in a grade book.

5. As a result of the practice, plaintiff children have experienced ridicule (Philip), incorrect grading (Elizabeth) and been asked to change grades of fellow students (Erica).

6. Teachers at the Owasso Public Schools employ the practice for purposes of giving the students "immediate feedback". Because of class size, if a teacher personally graded each paper, there would be delay in getting homework or quiz results to students. Further, not as much material would be covered. Students do not grade 9-week exams given at the Owasso Public Schools. The rationale given for not permitting a student to grade his or her own paper is the temptation of cheating.

7. Not every teacher employed by the Owasso Public Schools employs the practice of student grading, and no written guidelines exist as to its employment. The decision is left to the individual teacher. Bob Coke, the principal of the 7th grade center, testified that he "didn't

think" a teacher would require a student to call out a grade without the option of approaching and relating the grade in private, but this testimony makes it apparent that a teacher could presently do so in the teacher's discretion.

To the extent any of these Findings of Fact constitute Conclusions of Law, they should be so considered.

Conclusions of Law

1. This Court has jurisdiction over this action pursuant to 28 U.S.C §1331.

2. Venue is proper in this Court pursuant to 28 U.S.C. §1391.

3. When the opposing party has notice of the request for a temporary restraining order, as in this case, "the procedure that is followed does not differ functionally from that on an application for a preliminary injunction. . . . " 11A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, §2951 at 254 (2d ed. 1995).

3. [sic] To obtain injunctive relief, the moving party has the burden of establishing that (1) the movant will suffer irreparable injury unless the injunction issues, (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party, (3) the injunction, if issued, would not be adverse to the public interest and (4) there is a substantial likelihood that the moving party will succeed on the merits. *Walmer v. U.S. Dept. of Defense*, 52 F.3d 851, 854 (10th Cir.1995).

5. When a party seeking injunctive relief satisfies the first three requirements, the standard for meeting the fourth "probability of success" prerequisite becomes more lenient. The movant need only show questions going to the merits so serious, substantial, difficult and doubtful, as to make the issue ripe for litigation and deserving of more deliberate investigation. *Id.*

7. [sic] However, injunctions which seek to modify, rather than maintain, the status quo, are subjected to a higher standard. The movant is required to demonstrate that the factors supporting injunctive relief "weigh heavily and compellingly in the movant's favor." *SCFC ILC, Inc. v. Visa USA*, 936 F.2d 1096, 1098-99 (10th Cir.1991). The present motion requests modification of the status quo by asking this Court to prohibit the present grading practices in the Owasso Public Schools.

8. Plaintiffs bring this action pursuant to the Family Educational Rights and Privacy Act ("FERPA") and 42 U.S.C. §1983. The only two circuits to have addressed the issue have held that FERPA does not create a private right of action, but that plaintiffs may assert 42 U.S.C. §1983 claims premised on FERPA violations. *Fay v. South Colonie Century School Dist.*, 802 F.2d 21 (2d Cir.1986); *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir.1990). The Court will follow these decisions for purposes of the present motion.

9. FERPA provides in pertinent part that an educational agency or institution "which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents" is

in violation of FERPA. 20 U.S.C. §1232g(b)(1). This provision contains certain qualifications and exceptions which are not applicable here.

10. FERPA defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4)(A). *See also* 34 C.F.R. §99.3.

11. Plaintiffs have presented some evidence of humiliation and/or ridicule and uncomfortable peer pressure as a result of the student grading policy. Normally, such allegations would not suffice to establish "irreparable" harm. Such harm can be remedied through an award of money damages at trial on the merits. However, in view of the age of children plaintiffs, arguably the trauma which they have suffered affects their general ability to learn. Such a view is suggested, but not directly stated, in the affidavit of Eldon Storer, Assistant Professor of Instruction at Northeastern State University, attached to the plaintiffs' reply brief. A suggestion is not sufficient to establish that a factor weighs "heavily and compellingly" in plaintiffs' favor. It could also be argued that the very notion of "confidentiality" suggest that once such material is revealed, it cannot be re-concealed. In the case at bar, however, such a finding begs the question of whether these scores are in fact protected by FERPA. Even if protected, the revelation of a daily test score is not as damaging as a semester grade or other education records. The Court is not persuaded that the first factor has been established under the applicable burden of proof.

12. The Court is also not persuaded as to the second prong. In the context of this case, the Court believes it should not limit its view of countervailing harm to the school itself, but to the students within that school. While plaintiffs have established harm, the evidence likewise reflects that ordering an alteration of grading policy in the middle of the school year could cause disruption for Owasso Public Schools and its students. If teachers are not able to provide for the grading of papers, students will only receive their results after delay, or teachers will begin assigning less homework and quizzes. This may have a detrimental effect upon both teaching and learning. The Supreme Court has stated that courts "do not . . . intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *See also Wisconsin v. Yoder*, 406 U.S 205, 235 (1972) ("[C]ourts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education.") Under the heightened standard for this type of injunction, the Court is not persuaded that plaintiffs have shown that the second prong weights "heavily and compellingly" in their favor.

13. For similar reasons, the Court is not persuaded that plaintiffs have demonstrated by the requisite burden of proof that the requested temporary restraining order would not be adverse to the public interest. The practice of student grading is not limited to the Owasso schools, and has been employed in the United States for decades. At least, further factual development is required before

this Court enjoins its use. Thus, the third prong has not been met.

14. Finally, the Court concludes that plaintiffs have not established "heavily and compellingly" that they are likely to prevail on the merits. Defendants have submitted to the Court a letter, apparently written in 1993, which purports to be from one Leroy S. Rooker, Director of the Family Policy Compliance Office of the United States Department of Education. The Secretary of Education is given authority to enforce FERPA. *See* 20 U.S.C. §1232g(f). The letter purports to have been sent from Mr. Rooker to Mr. Wallace N. Raupp, II, Labor Relation Specialist for New York State United Teachers. The Letter states that it is in response to inquiries about whether certain activities violate FERPA. On the first page, one sentence states: "FERPA is not . . . intended to interfere with a school's, or classroom teacher's, ability to carry out what are generally considered to be normal and legitimate educational activities and functions." On the second page, a paragraph states:

> Likewise, FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

Plaintiffs object to the letter as hearsay. The Court has decided to consider the letter. Defendants were given less

than a day's notice of the hearing in this matter. It is unrealistic to expect them to produce fully authenticated documents or affidavits at this stage. "[I]nasmuch as the grant of a preliminary injunction is discretionary, the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be had." 11A Write, [sic] Miller & Kane, §2949 at 217. *See also Asseo v. Pan American Grain Co.*, 805 F.2d 23, 26 (1st Cir.1986) (the dispositive question is not whether materials are hearsay, but whether this type of evidence is appropriate, given the character and objectives of an injunctive proceeding).[1]

Plaintiffs have presented the view of Professor Storer by affidavit that he "disagree[s]" with the Rooker analysis of FERPA. However, this very disagreement indicates that the heightened burden of proof which plaintiffs face has not been met as to the fourth prong. This is even more true in this instance, in which the letter purports to be an interpretation of a statute by the agency charged with enforcing that statute. This raises the issue of possible judicial deference to that interpretation. *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Needless to say, this Court's ruling is an interlocutory one for purposes of resolving the present motion. If, for example, discovery proceeds and proves that the letter cannot be authenticated or does not reflect

[1] Much of plaintiffs' presentation at the hearing was in the form of hearsay, as Ms. Falvo related what her children had told her. Defendants did not object, but such objections would not have been sustained.

the present interpretation of FERPA by the Department of Education, the Court reserves the right to revisit the issue, or any other substantive issue discussed above. The heightened burden of proof which plaintiffs faced under the present motion will not be applicable to motions for summary judgment or trial on the merits, and the Court expresses no view as to the ultimate outcome.

To the Extent any of these Conclusions of Law constitute Findings of Fact, they should be so considered.

It is the Order of the Court that the motion of the plaintiffs for temporary restraining order is hereby DENIED.

ORDERED this 16 day of October, 1998.

/s/ Terry C. Kern
TERRY C. KERN, Chief
UNITED STATES DISTRICT
JUDGE

APPENDIX D

PUBLISH

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KRISTJA J. FALVO, as parent and next friend of her minor children, Elizabeth Pletan, Philip Pletan, and Erica Pletan; and on behalf of others similarly situated	)	
Plaintiff-Appellant,	)	No. 99-5130 (D.C. No. 98-CV-765-K)
v.	)	
OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a/ Owasso Public Schools; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal; JOHN DOE, sued as: Does 1 through 50,	)	
Defendants-Appellees.	)	

ORDER

(Filed October 4, 2000)

Before **SEYMOUR, Chief Judge, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO** and **MURPHY**, Circuit Judges.

This matter is before the court on appellees' petition for rehearing with suggestion for en banc review to which appellant has responded. Upon the original panel members' consideration of the rehearing petition, the request was denied.

The suggestion for rehearing en banc and appellant's response were transmitted to all of the judges of the court who are in regular active service. *See* Fed. R. App. P. 35. A poll was requested. A majority of the active judges voted, however, to deny the request for en banc review. Judges Tacha, Baldock, Brorby, and Kelly voted to grant the en banc suggestion.

Although the request for rehearing is denied, the panel has determined, on its own motion, that the original decision filed on July 31, 2000, shall be amended. Consequently, the original opinion is withdrawn. The amended opinion shall be filed forthwith.

The panel has taken appellant's requests for attorney's fees and costs under advisement.

KELLY, Circuit Judge, dissenting, with whom **TACHA, BALDOCK** and **BRORBY**, Circuit Judges, join.

I respectfully dissent from the court's denial of rehearing en banc. The court has determined that the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, is violated by a grading practice that allows students to grade one another's papers because the grades constitute "education records," *id.* § 1232g(a)(4)(A), that cannot be released to other students. Defining "education records" to include "grades which students record on one another's homework and test papers and then report to the teacher," Amended Ct. Op. at 22, is a vast expansion

of the actual words of the statute, and unsupported by the legislative history.

The grades that students record on one another's papers simply do not meet the second element of the definition of "education records," any more than the papers themselves could. 20 U.S.C. § 1232g(a)(4)(A)(ii). Neither the papers nor the grades placed upon them are "records, files, documents or other materials which . . . are maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* The papers (or at least the responses) belong to the student. The teacher may act for the educational agency or institution in recording the grade in a grade book (or on a spreadsheet), but it is one step removed to say that the teacher's potential receipt of that grade makes every uncompensated student that participates in the grading process "a person acting for such agency or institution."

Were there any doubt, the statute specifically provides that "education records" do not include "records of instructional . . . personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any person except a substitute." *Id.* § 1232g(a)(4)(B)(i). No one suggests that the teacher's grade book is accessible or has been revealed to any person except a substitute, or released to any person or group not within the exceptions created by 20 U.S.C. § 1232(b)(1). If the teacher's grade book normally does not constitute an "education record," how can it be that individual grades on papers can be "education records?"According to the court, if grades in a grade book revealed to someone other than a substitute are "education records," the grades prior to entry must also

be protected because they are disseminated to other students. *See* Amended Ct. Op. at 26.[1] The statute makes no mention of grades prior to entry being "education records," and had Congress intended such an important change in this sensitive area, surely Congress would have included express language to that effect. Relying "purely on the language of the statute itself," *id.* at 22, however, the court attributes its conclusion solely to Congressional intent. There is an obvious difference, however, between grades entered in a grade book (a collective record of the teacher) and the individual grades (on student papers) that are not recorded in a grade book. Surely Congress could have intended to protect one in limited circumstances, and not the other. Likewise, there is a difference between a final grade placed on a transcript and the individual scores that determine the final grade.

A careful reading of FERPA and its legislative history requires a much narrower definition of "education records." The school district correctly argues that extending the definition of "education records" to grades placed upon papers necessarily invokes the right to a hearing to challenge the grade, 20 U.S.C. § 1232g(a)(2), and the need

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[1] The critical part of the court's decision:

> If Congress intended FERPA to preclude a teacher from revealing to one student the grades of another when written in a grade book, it would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book or noting them in some similar way which serves the same purposes as a grade book record.

Amended Ct. Op. at 26.

for an educational institution to maintain an access record indicating those who have obtained or requested access to that grade, *id.* § 1232g(b)(4)(A). Given the thousands of grades a student might receive over time, this seem impossible, if not implausible.

Congress did not intend a right to a hearing on each and every grade received. In responding to concerns regarding § 1232g(a)(2), the Joint Statement in Explanation of Buckley/Pell Amendment drew a critical distinction between an institutional record in which a grade was recorded (the accuracy of which can be challenged) and the graded material itself (the accuracy of which cannot be challenged). The Joint Statement concluded that "education records" referred only to the former. 120 Cong. Rec. 39,862 (1974).[2] While grade books may qualify as institutional records, grades on papers certainly do not.

Practical difficulties with the court's decision abound because care must be taken to insure that no student learns the grade of another. Thus, a school district should be wary of academic awards based upon grades, for the

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[2] When interpreting a statute, a court should look to its plain language, resorting to legislative history in an attempt to discern congressional intent only when the language of the statute is unclear. See *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Contrary to the court's conclusion, the definition of "education records" to encompass grades placed on papers is far from clear on the face of the statute. The court reaches its conclusion only after assuming that if Congress intended to protect grade books, it also intended to protect graded papers and tests. Thus, whether "education records" refers to graded papers is unclear from the face of the statute. In such cases, consideration of legislative history is wholly appropriate.

underlying grades may be revealed. Likewise, a determination that a student athlete is academically ineligible carries the same risk. A routine function passing out a stack of graded papers alphabetized by name will now require teacher involvement and the students cannot do it themselves for fear that one student might see another's grade, intentionally or unintentionally. This cannot be what Congress meant when it sought to protect a student's personal information and permanent academic record from unwarranted disclosure. Our teachers are overworked and underpaid now. What will happen to them when they can be sued by every irate parent or student claiming that someone saw a grade or that they were denied a fair hearing to challenge a test grade? For these reasons, I respectfully dissent from the denial of rehearing en banc.

APPENDIX E

20 U.S.C. § 1232g. Family educational and privacy rights

a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or

institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations –

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i)

the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which –

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include –

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records

can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following –

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted –

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if –

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[1]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents

[1] So in original. The period probably should be a comma.

by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or

local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless –

> **(A)** there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or
>
> **(B)** except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided,* That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be

protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph

(1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding –

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from –

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if –

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KRISTA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN; and on behalf of all others similarly situated, Plaintiffs,	Case No. 98-CV-765-K (J) CLASS ACTION
v.	
OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal; and Does 1 through 50, Defendants.	

DECLARATION OF LEROY S. ROOKER

I, LeRoy S. Rooker, being of lawful age, to the best of my knowledge and belief and pursuit to 28 U.S.C. § 1746 do hereby declare as follows:

1. I am the Director of the Family Policy Compliance Office within the United States Department of Education. I have been Director of the Family Policy Compliance Officer [sic] ("FPCO") for eleven (11) years. In my position, I am responsible for directing and overseeing the activities of the FPCO. Pursuant to federal law and associated regulations, 20 U.S.C. § 1232g and 34 C.F.R. Part 99, the FPCO is charged with investigating, processing, and reviewing complaints and violations under the Family Educational Rights and Privacy Act ("FERPA"), and provides technical assistance to educational agencies and institutions to ensure compliance.

2. With regard to technical assistance, the FPCO frequently receives and responds to inquiries from educational agencies and institutions covering a wide range of FERPA issues. More specifically, the FPCO has received inquiries concerning the classroom practice of teachers allowing students to grade other students' papers. The FPCO has concluded that such a practice is not prohibited by FERPA, nor does it constitutes a FERPA violation. This is so because such papers fall outside the definition of education records as they are not yet maintained by the school.

3. The current position of the FPCO on the issue of students grading other students' papers is correctly set out in the letter dated-stamped July 15, 1993, from myself

to Mr. Wallace N. Raupp, II. A copy of the Letter to Raupp is attached as Exhibit "A" to this Affidavit.

4. The FPCO position articulated in the Letter to Raupp is not new; rather, it is consistent with the Office's long-standing position on the issue of students grading other students' papers.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 26, 1999.

/s/ LeRoy S. Rooker
Declarant, LeRoy S. Rooker

Mr. Wallace N. Raupp, II
Labor Relations Specialist
New York State United Teachers
Southwestern NY Regional Office
500 Cherry Street
Jamestown, New York 14701

Dear Mr. Raupp:

This is in response to your facsimile of June 17, 1993, in which you ask on behalf of teachers at the Dunkirk City School District (District) whether certain activities violate the Family Educational Rights and Privacy Act (FERPA). The activities you list concern general practices at the District by school officials which involve disclosure of information from education records. Because you do not fully explain the details surrounding the activities you identify, it would not be appropriate for this Office to comment on whether the District's participation in the activities would violate rights afforded parents by

FERPA. However, below is a general discussion of FERPA as it relates to the types of activities you present.

FERPA is intended, in part, to afford parents the right to have some control over disclosure of information from their children's education records. In this regard, it provides that information from a student's education records cannot, with certain exceptions, be disclosed without parental written consent. FERPA is not, on the other hand, intended to interfere with a school's, or classroom teacher's, ability to carry out what are generally considered to be normal and legitimate educational activities and functions. Thus, a thoughtful, common sense, and flexible approach is necessary in judging the impact of some classroom activities on a student's right to privacy and vice versa.

An educational agency or institution is not prohibited by FERPA from publishing or posting the grades of students unless it is done in a personally identifiable manner. For example, FERPA would preclude a school from posting grades by social security numbers, student ID numbers, or by names because these types of information are personally identifiable to the students. However, nothing in FERPA would preclude a school from assigning code numbers to students for the purpose of posting grades as long as the use of such numbers is limited to a legitimate educational interest in having access to that information.

Likewise, FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades

which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

On the other hand, publishing student averages in a newspaper or school bulletin would generally violate FERPA if prior parental written consent is not obtained. However, publication of an honor roll is generally permissible under FERPA. Specifically, listing students' names on a published honor roll would be consistent with the part of FERPA's directory information definition that covers awards received because it could be considered honorary recognition. 34 CFR 99.3. As long as the conditions in § 99.37 have been met and the parent of a minor student has not refused disclosure of directory information, a school can publish or release to another party, such as a newspaper, a list of students on the honor roll. A copy of the regulations are enclosed for your reference.

With regard to the activities which concern a student's education records being disclosed to school officials who are not teachers of the student, FERPA would not prohibit such disclosure if the school official has been determined by the school district to have legitimate educational interest in the student's records. Since each school district is responsible for specifying in its student records policy who are school officials and what is considered a legitimate educational interest, someone with questions as to whether a specific school official, such as a coach, resource teacher, or secretary, can access a certain student's education records should refer to the district's

student records policy or seek the assistance of the appropriate administrative officials at the district level.

I trust that the above information is helpful in providing guidance to you regarding the various concerns you have raised. If you wish to have specific responses to any of the possible disclosures of information from education records which you noted in your facsimile, you may contact this Office again. At such time, please provide specific details concerning such disclosures, including the relationship of the party to the school district and to the student to whom the records relate.

Sincerely,

LeRoy B. Rooker
Director
Family Policy
Compliance Office

Enclosure